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Supreme Court
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted]26

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,

Petitioner (Plaintiff-Appellee-Appellant Below),

—against—

MAXIME H. FURLAUD and KINGSTON CORPORATION,

Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,

Defendants-Appellees Below,

and

CARLOS REUTER,

Defendant Below.

BRIEF OF APPELLEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS B. EPPSTEIN,
IRA W. HIRSHFIELD,
LOUIS J. ALTKRUG,
Of Counsel.

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This brief is submitted in opposition to a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit presented by the complainant herein.

The United States Circuit Court of Appeals for the Second Circuit reversed the decree entered by the United States District Court for the Southern District of New York in favor of complainant, upon the merits.

Statement.

I.

Concerning the Pleadings.

The amended complaint in this case, if it states a cause of action at all, does so upon the theory that as a result of certain representations made by Furlaud & Company, Inc. to the purchasers from it of securities acquired by it from the Duquesne Gas Corporation, it received the amounts paid to it for these securities by such purchasers as trustee for the Duquesne Gas Corporation.

The first seven paragraphs of the complaint are devoted to a description of the parties, their relations to one another and allegations affecting jurisdiction.

The eighth paragraph alleges the offerings of the securities and the representations made. Attention is called to the fact that the only allegation in the complaint as to representations made to purchasers was that it was stated: "These bonds were issued by the corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes," and in the case of the notes, "These notes are issued by the corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes."

There is no allegation anywhere in the complaint that these statements were false nor that any person was deceived thereby nor that anyone was induced thereby to purchase any of these securities.

The ninth, tenth, eleventh, twelfth and thirteenth paragraphs contain allegations referring to the transaction between the parties.

The fourteenth paragraph alleges merely the conclusion that some of the defendants were promoters of the Duquesne Gas Corporation and that they stand in a fiduciary relationship to it.

The fifteenth and sixteenth paragraphs are devoted to the history of the transaction.

The seventeenth paragraph reads as follows:

> "That the complainant, as Receiver, is entitled on behalf of Duquesne Gas Corporation to have the defendants account to the corporation *for the funds or moneys coming into their hands or into the hands of any of them or their agents or representatives from the sale of the securities of said Duquesne Gas Corporation* or of any of said securities, and for the disposition made of such funds or moneys and to make restitution for any or all of such funds or moneys wrongfully diverted from Duquesne Gas Corporation and misappropriated or converted by the defendants or any of them to their own uses and for any or all secret or excessive profits taken or retained by them or any of them; that your complainant has no adequate remedy at law and your complainant's rights may only be properly adjudicated in this Court of Equity." (Italics ours).

We respectfully repeat here the position we have taken in the trial court and in the Circuit Court of Appeals namely, that this complaint does not state facts which constitute a cause of action in favor of Duquesne Gas Corporation or its receiver against any one.

II.

Concerning the Facts.

Petitioner contends that there is a conflict between the statement of facts as found by the Circuit Court of Appeals and that of the United States District Court, charging that in the opinion of the Circuit Court of Appeals at several places it states "that, at the time of the closing the defendants owned all of the issued common capital stock of the Duquesne Gas Corporation and all of its bonds and notes;" and that this was not true and that it was not so found to be true in the opinion of the District Court.

The trouble with this statement contained in the Petition for a Writ of Certiorari is that it is not in accord with the findings of fact of either court which, as we will show, are in accord upon this and every material subject.

The facts briefly are as follows:

Furlaud & Company, Inc., a corporation, owned all of the issued and outstanding stock of Kingston Corporation, a corporation organized under the laws of the State of New Jersey. It also organized and at the time of closing and for weeks thereafter owned all of the stock of Duquesne Gas Corporation. Kingston Corporation had acquired options on various properties upon which it had paid various sums of money and on April 7, 1930 these two wholly owned subsidiaries of Furlaud & Company, Inc. entered into an agreement of reorganization.

Quoting from Judge Knox's opinion (Record, p. 322, fols. 965-969):

"This instrument provided that Kingston

Corporation would acquire the optioned gas properties then in escrow, and turn them over to Duquesne Gas Corporation. The latter, on its part, agreed to pay $3,015,000. to Central Hanover Bank & Trust Company, the amount which Kingston Corporation would be under obligation to pay to the Trust Company. The Duquesne Company further agreed to issue 535,000 shares of its stock and $1,300,000. face value of its first mortgage six percent gold bonds to Kingston Corporation, the bonds to be secured by an indenture, dated March 15, 1930, in which the Trust Company was named as Trustee. On April 9, 1930, the following transactions were had at the offices of Central Hanover Bank & Trust Company:

"Maxime H. Furland arranged with the bank that for a period of one day the Kingston Corporation should have a credit of $3,015,000, and that Furlaud & Company, Inc. for a like period of time, should be entitled to a credit of $3,379,500.

"When these credits, which were both closely controlled by the Trust Company, had been set up, Kingston Corporation delivered its certified checks, in the aggregate amount of $2,449,900. to the Equitable Trust Company, Guaranty Trust Company of New York and Central Hanover Bank and Trust Company, respectively. These checks were intended to put the drawees in funds with which to meet drafts which had been drawn against them by the banks in Western Pennsylvania, which held in escrow the several instruments of conveyance by which the gas properties were to be transferred to Duquesne Gas Corporation * * *.

"The banking institutions which received the checks of Kingston Corporation having made

telephonic and telegraphic reports of the payments of the purchase money drafts to the banks holding the escrowed conveyances, the latter were straightway delivered and recorded. *This information, being received, Duquesne Gas Corporation proceeded to issue to Kingston Corporation the 535,000 shares of stock and $1,300,000 face value of bonds which were called for by the agreement of April 7, 1930.* (Italics ours).

"Thereupon, Furlaud & Company, Inc. delivered its check to Duquesne Gas Corporation in the sum of $3,379,500. This was supposed to represent the proceeds which the gas corporation was to receive for $2,700,000. par value of its six percent bonds, its million dollar issue of gold notes, and 139,000 shares of its capital stock. *All of these securities were contemporaneously delivered to Furlaud & Company, Inc.* * * *" (Italics ours).

These represented all of the securities ever issued by Duquesne Gas Corporation.

Quoting from Judge Manton's opinion (pp. 388-9 of the Record):

"As stated by the Court below:

'At the time that the transactions through which Duquesne Gas Corporation acquired the various gas properties were consummated, and for some time thereafter, Furlaud & Company, Inc., owned every share of its capital stock, and ratified and approved of the whole transaction.'

At the end of these transactions, the two corporations, Furlaud & Company, Inc. and its subsidiary, Kingston Corporation, owned all of the issued common capital stock of the Duquesne Gas

Corporation, and all of its bonds and notes. No other person purchased from Duquesne Gas Corporation a share of stock, a bond or a note."

From these quotations it will appear that there is no conflict between the findings upon this subject of the Circuit Court of Appeals and those of the Trial Court.

Moreover, there is no conflict in the testimony upon this subject.

Thomas W. Duke, who was counsel for Furlaud & Company, Inc. in charge of this transaction was put upon the stand by the Petitioner. His testimony, starting at page 117, of the Record, discloses the fact that the money used in paying for the properties was furnished by Furlaud & Company, Inc., that the transaction was concluded exactly as stated in the opinion of Judge Knox and summarized in the statement of Judge Manton—that after the purchase price of the properties had been paid by Kingston Corporation, the deed and mortgages recorded and the securities duly authenticated, the stock and securities were all released to Kingston Corporation and Furlaud & Company, Inc. respectively.

What, then, is the position of the Petitioner in this case?

As stated by both courts in effect, the receiver has always contended and still contends that misrepresentations, as to the value of the property acquired by Duquesne Gas Corporation in this transaction, *made by Furlaud & Company, Inc. to purchasers from it on the resale of the securities so acquired,* constituted a wrong to Duquesne Gas Corporation for which the receiver of that corporation may now recover. He contends that as the result of such alleged misrepresentation the purchasers were induced to part with their money and that as a further

result a trust in this money arose in favor of Duquesne Gas Corporation.

The receiver further contends that even though any cause of action arising out of such alleged misrepresentation was personal to the party deceived thereby to his harm, and even though said party had the right of election of various remedies, this receiver in his official capacity was empowered to vindicate the rights of creditors who were victimized. Opinion by Knox, *D. J.*, Record, pages 332-333, folios 996-997.

We have never contended that if in the sale or resale of securities material misrepresentations were made to a purchaser who in reliance upon such representations made such purchase, that a cause of action would not result in favor of the purchaser so deceived.

What we do contend is that as a result of such transaction, no trust would be created in favor of the corporation that issued such securities.

In the opinion by Knox, *D. J.*, the theory upon which this case was tried in the lower court is presented as follows (fols. 952-953, p. 318 of the Record):

> "This is a suit in equity brought by complainant, as Receiver of Duquesne Gas Corporation, to compel defendants to account
>
> 'for all funds or moneys coming into the hands of them or any of them, or of the agents or representatives of any of them, or in the hands of anyone else acting with or for them, *from the sale* of the bonds, notes and shares of stock of said Duquesne Gas Corporation.'
>
> "The special grievance of the bill is that defendants, or some of them, through the instrumentality of an alleged banking house, known as Furlaud & Co. Inc., came into possession of

funds arising from the public offerings of securities of Duquesne Gas Corporation, in the relationship of fiduciaries to that company, and that a large portion of the funds so received, were diverted and misappropriated from the treasury of the gas corporation." (Italics ours.)

An examination of the complaint will show that the complaint contained no allegation charging misrepresentation of any kind.

As we have shown the only representation referred to in the complaint was the representation as to the purposes of the issue. As to that there is no allegation in the complaint that it was not true. Moreover, that representation, as shown by the evidence, was literally true. There is nothing in the complaint showing that any representations were made to the public as to the value of the property acquired by Duquesne Gas Corporation, nor is there anything in the complaint alleging what the value of the property transferred to Duquesne Gas Corporation was.

Upon the trial of the case, however, evidence was introduced tending to establish the fact that the notices issued upon the public offering of these securities contained statements to the effect that appraisals had been made of the property by engineers fixing the value, including working capital, at $7,038,000 and that at least one of these appraisals greatly overestimated the value of the property included in it.

This evidence was admitted over the most strenuous objection of the defendants who insisted that it was not admissible under the allegation of the complaint, claimed surprise and stated that they were not prepared to proceed upon that issue. They objected so persistently that finally a stipulation was made in open court that defendants should be con-

sidered to have a blanket exception to the admission of all testimony upon this subject (Record, fols. 250-269, 270-280, 290-299, 461-465, 480-484).

Upon the appeal to the Circuit Court of Appeals, the defendants, among other things, asked for the reversal of this case upon the ground that such evidence was improperly admitted and considered by the Court.

Attention is here called to this testimony because it became the basis for the entire attack upon the transaction and it was upon this testimony that the District Judge justified his decision.

Argument.

In his petition for a writ, Petitioner presents his propositions under the headings of "The Questions Presented".

Questions (1) and (2)

Under the first and second questions so presented, Petitioner asks whether the case falls under the authority of *Old Dominion Copper Company* v. *Lewisohn,* 210 U. S. 206 (52 L. Ed. 1025), rather than within the authority of *Davis* v. *Las Ovas,* 227 U. S. 80 (57 L. Ed. 426).

We again respectfully call attention to the fact that under the pleadings in this case, if complainant can recover at all it must be upon the theory that a misrepresentation made by a banker in the resale of securities purchased by him, impresses upon the money received by him, from such sale, a trust in favor of the corporation which issued the securities.

This suit is not brought to recover alleged secret profits but the complaint demands an accounting of certain sums of money which it contends became a trust fund.

However, answering the questions categorically and assuming for the sake of the argument that the complaint was drawn in such manner as to make the inquiry pertinent, we call attention to the facts:

In the case of *Davis* v. *Las Ovas, supra,* there were innocent stockholders involved at the very time of the transaction complained of.

In the transaction between Duquesne Gas Corporation and its promoters there were no other parties involved. The promoters and the promoters alone were on both sides of the transaction. They transferred to Duquesne Gas Corporation, their wholly owned subsidiary, certain property and money and received in return every share of stock and every security ever issued by Duquesne Gas Corporation. No other person ever dealt with that corporation for any of its securities.

If the promoters had retained all of these securities, the question could not have arisen.

If the promoters had disposed of the securities to strangers with full notice of all of the facts, the question could not have arisen.

If then, in the resale of these securities it be admitted for the sake of the argument, that misrepresentations as to the value of the property conveyed to the Duquesne Gas Corporation were actually made, would that *nunc pro tunc* create a cause of action in favor of Duquesne Gas Corporation?

We think the language of this Court in the case of *Old Dominion Copper Company* v. *Lewisohn, supra,*

upon this subject disposes of this question. Mr. Justice Holmes, speaking for this Court, said:

> "If there was a wrong, it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation *nunc pro tunc,* but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now."

Petitioner attempts to distinguish the rule announced in the case of *Old Dominion Copper Company* v. *Lewisohn,* 210 U. S. 206, 52 L. Ed. 1025, as applied in *Ball* v. *Breed,* 294 Fed. 227, from the facts of this case upon various grounds.

Petitioner seems to have forgotten that in the application to this Court for a writ of certiorari in *Ball* v. *Breed,* practically the identical questions were presented as are presented in this petition and that the writ was refused.

Further, on page 15 of the Petition, Petitioner says with reference to the case of *Ball* v. *Breed, supra,* and others:

> "* * * the decisions seem to be based more upon the fact that in those cases, the promoters' profits were not excessive or secret."

In the case of *Ball* v. *Breed,* the profits amounted to $1,100,000. In this case if the expenses incurred by the promoters in procuring the property had been allowed and the securities received had been given the same value as the corporation received for other securities, the profit would have amounted to $1,170,000.

In the case of *Ball* v. *Breed,* not only was a syndicate to purchase and distribute formed, but a twenty per cent. call was made upon the syndicate and paid in in *advance* of the closing transactions between the Bankers and the H. A. Co., and the money produced as a result of this call came into the hands of the promoters as managers of the syndicate and was the identical money used in purchasing the first block of H. A. Co. stock.

It is true that in this case, the bankers had negotiated for the sale of some of the securities which they were to acquire from the Duquesne Gas Corporation prior to the date of closing but they were unable to lay their hands on the money and did not get possession of any of the money which was to be paid them in exchange for those securities in advance of the closing but only after the securities had actually been issued and delivered to them. It was, therefore, necessary for them to furnish the funds with which to acquire the property to close the transaction out of their own resources before they could acquire the securities to resell to the prospective purchasers. In order to accomplish this, the Petitioner himself has shown that they caused two day loans to be made by the Central Hanover Bank & Trust Company, one for $3,015,000 to the Kingston Corpo-

ration and the other for $3,379,500 to Furland & Company, Inc. (fols. 349 and 355, pp. 117 and 119 of the Transcript of Record) and that they independently borrowed from Chatham & Phenix National Bank & Trust Company $700,000, from Hibernia Trust Company $300,000, and from the Pacific Trust Company $500,000 (fols. 378 and 379, pp. 126-127 of the Transcript of Record). With this money they paid for the property under option and closed the transaction with Duquesne Gas Corporation and after receiving the securities proceeded as rapidly as they could to sell same and pay off the day loans. Some were distributed upon the very day of the closing in consummation of contracts previously made. The amount received from these, as shown by Mr. Halporn who made the calculation in open court from the books of the corporation at the request of the Court, is fixed at $1,886,330 (fol. 542, p. 181 of the Transcript of Record). Based upon the estimate of a salesman, who was not present at the closing and did not pretend to know exactly what amount was actually delivered on that day, that about 75 to 80 per cent. had been subscribed for at some time or other, the Trial Court found another amount.

We do not think that this question is at all material. Obviously, if the fact that prior to the closing the bankers entered into contracts for the sale of the securities that they intended to acquire, if as and when they acquired such securities, had the effect of making the purchasers of such securities innocent members of the corporation, it is apparent that a sufficient number of people indicated their willingness to buy these securities if issued and, after they were issued, actually did buy them to make the exact amount of such purchases immaterial.

Petitioner contends that the dealings of Furlaud & Company, Inc. with its distributing group prior to the closing had the effect of bringing this within the rule of *Davis* v. *Las Ovas, supra.* However, in that case the corporation was actually organized by the syndicate itself (the defendants being members of that syndicate) and the original issue of the stock of the corporation was subscribed for and delivered by the corporation simultaneously to the other members of that syndicate as well as to the promoter member of the syndicate who made the secret profit complained of in that case.

The case of *Davis* v. *Las Ovas* was fully considered by the Circuit Court of Appeals of the Second Department in its decision in the case of *Ball* v. *Breed, supra,* and this very distinction was pointed out. The Court said (p. 232):

> "In *Davis* v. *Las Ovas,* 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426, the court held that, where the true consideration of a syndicate purchase is concealed, and the property is conveyed at a higher figure in shares of stock to a corporation *whose stock is held partly by members of the syndicate and partly by others,* and the necessary increase of shares to pay for the property goes to some of the syndicate promoters as a secret profit, the corporation may maintain an action to require those obtaining the shares to surrender them for cancellation." (Italics ours.)

Continuing, this Court says (p. 232):

> *"In the case at bar, there is no such state of facts. It is nowhere alleged as a fact, nor can it be inferred, that there were any innocent stockholders at the time of the transaction complained of. If, then, there was a fraud, it was not against*

the corporation, and a cause of action, if any, is personal to the purchasers of the stock. The fraud, if any, is what has been called a subsidiary fraud not affecting the corporation. Allowing to the complaint the most favorable inference, all that can be said is, as concisely stated by the District Court, that:

> 'These transactions between the defendants and the subscribers to their syndicate had nothing to do with the formation of the corporation, the syndicate subscribers only agreed with the syndicate managers to take what the managers get for them, and they got it through the managers.'" (Italics ours.)

In this case the transactions between Furlaud & Company, Inc. and the members of its syndicate, and the transaction between the syndicate and the distributing group, had nothing to do with the formation of the corporation. The syndicate subscribers and the distributing group only agreed with the syndicate managers to take what the managers got for them and they got it through the managers. The syndicate in the *Las Ovas* case was composed of co-adventurers, a partnership so to speak. The syndicate here were buyers from Furlaud & Company, Inc.

Moreover, we again call attention to the fact that even if the facts in this case fell within the doctrine laid down in the case of *Davis* v. *Las Ovas,* this complainant could not recover in this case upon that theory upon the complaint here.

The complaint does not allege any facts under which a recovery could be had upon that theory. There are no allegations of facts under which such relief was or could be asked for. The complaint proceeds upon the theory that the promoters received certain

sums of money from the purchasers of these securities under such circumstances that a trust was impressed upon the monies received by them, and the complaint demands that they be compelled to account for the proceeds of the sale of these securities. The complaint does not allege that there were any innocent members of the corporation at the time of the closing but is based solely upon the proposition that because of certain representations made to prospective purchasers of securities to be acquired by Furlaud & Company, Inc., a duty arose upon the defendants or some of them to account to Duquesne Gas Corporation for the proceeds of the sale of these securities.

On page 4 of his brief in support of petition the position of the Petitioner is stated very clearly:

> "The bondholders and noteholders must have intended that the proceeds of their subscriptions were to be used for the benefit of the corporation. The defendant well knew this, for the simple reason that the prospectuses which they issued induced in the subscribers to the bonds and notes this belief.
>
> "Where one delivers money to another with the intention that that other shall pay the money to a third person, a trust arises which may be enforced by that third person. *McKee* v. *Lamon,* 159 U. S. 317, 322; *Sayer* v. *Wynkoop,* 248 N. Y. 54; 2 Story's Equity Juris. (12th Ed.), Sec. 1255; 26 R. C. L. 1235, Sec. 82."

We do not believe that the foregoing statement correctly announces the proposition of law asserted in the cases cited, but a complete answer to this contention of Petitioner is that no one delivered money to Furlaud & Company, Inc., with instructions to, or

with the intention that Furlaud & Company, Inc. should pay the money to Duquesne Gas Corporation.

There is not a word of testimony to that effect.

The real transaction between Furlaud & Company, Inc. and the purchasers of these securities was that Furlaud & Company, Inc. offered the securities for sale if, as and when issued, the purchasers bought the securities and after they were issued received the securities from Furlaud & Co. Inc. and paid for them, and so far as the record in this case shows no purchaser of such securities was aggrieved by anything that Furlaud & Company, Inc. did. The complaint does not allege that any misrepresentations were made, it does not appear that any one was deceived by any representation made or was thereby induced to purchase a single security, nor does it appear from the complaint that any purchaser was dissatisfied with his purchase or that he was not recompensed by Furlaud & Company, Inc. for any loss sustained by him. Upon all of these questions which would be very material in a suit brought by one of these purchasers not only the complaint but the testimony is wholly silent.

No principle of equity jurisprudence is more firmly fixed than that the *allegata* and *probata* must correspond and that, the plaintiff, in equity, cannot recover if his proof does not harmonize with the allegations in his bill. Any other rule would do away with the necessity of pleadings and lead to surprise, unfairness and injustice. From the earliest time this principle has been announced and reannounced by this Court.

In the case of *Foster* v. *Goddard,* 1 Black 506, the Supreme Court of the United States, per Mr. Justice Swayne, said (p. 518):

"In equity proceedings the proofs and allega-

tions must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. *Simms* v. *Guthrie,* 9 Cranch 19; *Harrison* v. *Nixon,* 9 Pet. 483; *Boone* v. *Chiles,* 10 Pet. 178; *Trip* v. *Vincent,* 3 Barb. C. H. 613; *Bank of U. S.* v. *Shultz,* 3 Ohio R. 61; *Sadler* v. *Glover,* 5 Dana, 552; *Breckenridge* v. *Ormsby,* 1 J. J. Marsh 236."

In *Harrison* v. *Nixon,* 9 Pet. 483, Mr. Justice Story stated (p. 503):

"Every bill must contain in itself sufficient matters of fact, *per se,* to maintain the case of the plaintiff; so that the same may be put in issue by the answer, and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision; for the pleadings do not put them in contestation. The *allegata* and *probata* must reciprocally meet and conform to each other."

In the case of *Crocket* v. *Lee,* 7 Wheat. 522, Mr. Chief Justice Marshall, in discussing a similar situation, said (p. 526):

"The counsel for the appellant says it would be monstrous, if, after the parties have gone to trial on the validity of the entry, and have directed all their testimony in the Circuit Court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the Court where it might have been amended, and the non-existence of which would not have varied the case.

"The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of Chancery—rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the Court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, different from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice required, but one which necessity imposes on Courts."

This doctrine has been reaffirmed by this Court as recently as in the case of *Garrett* v. *Louisville & N. R. Co.*, 235 U. S. 308.

Moreover, in this case the vice of the Petitioner in completely abandoning the allegations of fact and the theory advanced in his complaint and amended complaint is magnified by the following circumstance.

When this amended complaint was served upon the defendants they were at a loss, as they still are, to understand upon what theory the plaintiff could recover.

Prior to answering the amended complaint, the defendants made an application, pursuant to Equity Rule 20, to compel the complainant to make a further and better statement of the nature of the claim set forth in the amended complaint (fols. 55-99).

This application was opposed by counsel for the complainant on the ground that the complaint complied with Equity Rule 25. Counsel stated in his affidavit that the action was brought to compel fiduciaries to account to:

> "* * * Duquesne Gas Corporation and to complainant as its Receiver for all funds or monies coming into the hands of them or any of them from the sale of the bonds, notes and shares of stock of Duquesne Gas Corporation" (fol. 109).

The plaintiff here had the fullest opportunity to re-state his case and to allege all of the facts upon which he intended to rely. He had not then alleged and has never since alleged any facts showing or tending to show the concealment of any fact by any party. True, he alleges that certain representations were made, which representations taken alone were admittedly true.

Complainant does not even suggest that they were not true, nor does he allege any fact which taken in connection with such allegations would taint them with the charge of being made with the intent to deceive.

It is true that upon the trial he introduced evidence over the strenuous objection of the defendants to the effect that certain other representations, nowhere pleaded, were made to the purchasers of these securities and that such representations were in fact not true.

We have shown that even these so-called misrepresentations would not entitle the complainant to recover even though they might have created a cause of action in favor of some one else.

What we are calling attention to is the fact that the amended complaint in this case fails to contain any

allegations of misrepresentation and the further fact that complainant as a result of defendants' motion had the fullest opportunity to file a proper complaint and to make a further and better statement of the nature of the claim upon which he intended to rely and that he failed and refused to do so.

Questions (3) and (5)

The third question asked by the Petitioner will be treated with the fifth.

The two questions amount to this: "Would the fact that the corporation was rendered insolvent as a result of the transactions with its promoters, give to the receiver, acting in the interest of the purchasers of the securities, the right to disaffirm the acts of the corporation?"

There is no allegation in the complaint showing or tending to show that the corporation was insolvent at the time of its organization, and we therefore insist that the inquiry here presented for the first time, is in no wise pertinent.

Nor has petitioner ever sought to disaffirm the acts of the corporation. He is and always has been asking for an accounting of the proceeds of the resale of securities upon which he insists a trust was impressed as the result of certain representations made at the sale thereof.

Again, however, assuming for the purpose of the argument only, that the issue was presented, we insist that no cause of action growing out of those facts would have accrued to Duquesne Gas Corporation, or to its Receiver.

At the time of the transaction between the promoters and Duquesne Gas Corporation, no wrong was done to any one. The promoters transferred to their

wholly owned subsidiary certain property receiving in exchange for it all of the securities ever issued by such wholly owned subsidiary.

Obviously no wrong to Duquesne Gas Corporation resulted from this transaction.

If they had retained these securities, no wrong could have resulted to any one.

If they had disposed of all their securities with full disclosures of all of the facts no wrong could have resulted to any one.

If they had disposed of their securities under such circumstances as would have resulted in a fraud upon the purchasers thereof, the position of Duquesne Gas Corporation would have remained the same as before but, the purchasers might in that event have been injured and if so, each purchaser harmed would have had a cause of action against the sellers. However, such cause of action would have been personal to the party aggrieved.

Question (4)

The fourth question presented is not fairly within the issues. There is nothing in the notice which could be construed to be a statement or promise that the proceeds of the sale of the securities sold by Furlaud & Company, Inc., were to be used for any particular purpose. The transactions between Furlaud & Company, Inc. and the persons to whom it sold securities were ordinary transactions of sale. Furlaud & Company, Inc. had categorically stated that it had bought these securities "if as and when issued and approved by its counsel" and was offering them to a selected group of distributors (Record, p. 255, fol. 764).

The representation complained of simply stated that under the caption "Purposes of the Issue" Fur-

laud & Company, Inc. had stated that the securities were issued in connection with the acquisition of property and to provide working capital for the corporation.

However, for the purpose of this discussion only, let us assume that the representations were as stated by Petitioner, and that they were false and that the purchasers of these securities were deceived thereby. How could any representation made by Furlaud & Company, Inc. in the resale of these securities injure Duquesne Gas Corporation? It, Duquesne Gas Corporation, with full knowledge of all of the facts had concluded its transaction. At that time it admittedly had no cause of complaint against any one.

Certainly, misrepresentation made by Furlaud & Company, Inc. in the resale of the securities might create an actionable wrong but the injury resulting from such misrepresentation would not be to Duquesne Gas Corporation but to the purchasers of the securities, and any cause of action resulting therefrom would be theirs.

Question (6)

As to the individual liability of the defendant Maxime H. Furlaud—the record shows that all of the transactions in connection with the acquisition of the property were conducted by others, and Furlaud is not shown to have had anything to do with any of these transactions. However, he was the President of Furlaud & Company, Inc. and did negotiate and secure from various banks the funds required to close the transactions. If the money received by Furlaud & Company, Inc. in payment for the bonds sold by it to various purchasers was impressed with a trust in favor of Duquesne Gas Corporation, it may be

that Furlaud individually as an officer of that corporation might become obligated to see that the trust was executed and if the funds were diverted with his knowledge and consent it might be that he would be liable as a trustee *de son tort.*

Is it not, however, too clear for argument that the transaction engaged in by Furlaud & Company, Inc. in selling these securities was merely an ordinary transaction involving the sale of its property. It delivered the property sold and received the purchase price. It is not here contended that but for the alleged representations made in the resale of these securities any one could have complained.

We insist that the only persons who could have been injured by such representations, would have been the persons to whom they were made and that any causes of action that might result therefrom would be the causes of action of such persons.

There is in this case no allegation or proof that any person was misled by any representations made in these circulars, nor that any one acted on them, or complained because of them.

Recapitulation.

We contend:

1. That the complaint in this case does not state a cause of action in favor of any one, or against any one, upon any theory:

A. Because it nowhere alleges that the representations made as to the purposes of the issue or upon any other subject were false;

B. Because it nowhere alleges that the property conveyed to Duquesne Gas Corporation was not fully worth the amount paid for it;

C. Because it nowhere alleges that there was any representation of overvaluation or other misrepresentation made to the purchasers of the securities or to any one else.

D. This complaint does not even allege facts sufficient to establish a cause of action in favor of a purchaser of these securities.

It nowhere alleges that any representations made by the sellers were false nor that any one was deceived thereby or was induced thereby to purchase any of the securities so offered.

The complaint proceeds wholly upon the theory that where a banking house of issue makes representations, to purchasers of its securities from it, that the securities were issued in connection with the acquisition of property and to provide cash for development, extension and other corporate purposes, that such representations whether true or false, impress a trust upon the proceeds of the sale of such securities in favor of the corporation that issued the securities.

We do not think it requires the citation of authorities to negative this proposition.

2. That even including the evidence improperly admitted in this case, the facts disclosed would not under any theory establish a cause of action in favor of Duquesne Gas Corporation or its receiver because:

A. At the conclusion of the transactions between the Duquesne Gas Corporation and its promoters and as a result thereof they, the promoters, acquired all of the stock, all of the bonds, and all of the notes ever issued by that corporation and at that time were the sole owners of the corporation and were its sole creditors.

B. Even if in the resale of these securities these promoters made misrepresentations as to the value of the property owned by Duquesne Gas Corporation and the purchasers of such securities or any of them were injured thereby, such acts on their part could not create a cause of action in favor of Duquesne Gas Corporation.

If a cause of action in favor of various purchasers of securities did result from any transaction between such purchasers and any of these defendants, neither Duquesne Gas Corporation nor its receiver had any title to or interest in such cause of action. Whatever rights accrued to any of such purchasers would depend upon the particular circumstances of the transaction between each purchaser and his vendor.

Moreover, the owner of that cause of action would have an election of remedies. He might rescind, if he so elected. He might bring an action at law for the wrongs, if any, done him, but as has so often been said by the authorities not only would such cause of action be personal to the party aggrieved but the right of election would be his and his alone.

We respectfully submit that whatever may be the rights of others against the promoters of Duquesne Gas Corporation, the complaint in this case does not allege nor does the evidence, including that improperly admitted, establish any cause of action on behalf of Duquesne Gas Corporation against them.

We therefore respectfully pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Of Counsel.